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In the Supreme Court of the United States

October Term, 1945

No. 152.

FRANK CANIZIO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK.

RESPONDENTS' BRIEF.

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RESPONDENTS' BRIEF.

Opinion Below.

The petitioner proceeded by motion, *coram nobis*, in the County Court, Kings County, for an order vacating and setting aside a judgment of conviction against him dated June 19, 1931. The motion was based on the claim that at the respective times of his arraignment, when he pleaded not guilty to the indictment, and subsequently when he withdrew such plea and pleaded guilty, and again

later when he appeared for sentence, he was not advised of his right to counsel, and was in fact not represented by counsel. The motion was denied by an order made April 13, 1945 (Sobel, C. J.), unaccompanied by any opinion.

Jurisdiction.

The order of April 13, 1945, denying petitioner's motion to vacate and set aside the judgment of conviction dated June 19, 1931, was not appealed from. The order is not appealable (*People v. Gersowitz*, 294 N. Y. 163).[1] The jurisdiction of this Court is, therefore, sought to be invoked under section 237 (b) of the Judicial Code as amended (28 U. S. C. A., Sec. 344 [b]) on the ground that the order of the Kings County Court, being under New York practice non-appealable, constitutes that court "the highest court of the state in which a decision could be had * * * *"

It is our purpose to show in this brief that jurisdiction does not exist, as contended by the petitioner, because: 1. on all of the facts, no federal question of due process of law is presented to this court; and 2. the petitioner has failed to exhaust his remedies in the state courts and for this reason has not proceeded to the highest court in which a decision could be had.

Questions Presented.

The petitioner raises the following questions (petitioner's brief, p. 3):

1. Petitioner was deprived of his constitutional rights in that on the motion to vacate the judgment of conviction he was not accorded a full and complete hearing.

2. Petitioner was deprived of his constitutional rights in that he was not advised of the right to counsel.

[1] Later in this brief we discuss the non-appealability of the order in relation to the questions involved on this appeal.

Statement of the Case.

On May 25, 1931, the petitioner was indicted, together with Patsy Guariglia and Tony Bruno, for the crimes of Robbery in the First Degree, Grand Larceny in the Second Degree, and Assault in the Second Degree. The indictment charged that the defendants, acting in concert, by force and fear took from one Joseph Grosshandler a taxicab, Bruno then being armed with a revolver. On that day all of the defendants were arraigned before Kings County Judge Nova and pleaded not guilty. However, on June 1, 1931, they all personally appeared before Judge Nova, withdrew their pleas of not guilty, and pleaded guilty to the crime of Robbery in the First Degree, unarmed. On June 19, 1931, the petitioner was sentenced to a term of fifteen to thirty years in State's Prison.

In the moving papers before Judge Sobel the petitioner alleged that at the time of the arraignment and also of plea he was nineteen years of age, unfamiliar with legal procedure; was without counsel, was not advised by the court of his right to counsel, and was not asked by the court if he desired that counsel should be assigned. A similar allegation was made as to the lack of counsel on the day of sentence (R. 6-7).

The respondents here challenge, as in the proceeding in the County Court they challenged, the accuracy of these allegations of non-representation by counsel. While the records of the County Court in the matter are silent as to the fact of representation at the time of the petitioner's arraignment on May 25, 1931, and of his plea of guilty on June 1, 1931 (R. 11), they do show that on June 17, 1931, and thus two days before the petitioner was sentenced on June 19, 1931, a notice of appearance was filed in his behalf by an attorney named John J. Olivia (R. 22); and that Mr. Olivia appeared for him on the day of sentence (R. 24, *et seq.*).

The respondents urge that, with respect to the day of arraignment and the day of plea, a strong presumption of regularity exists that the trial court performed its duty in the premises and advised the petitioner of such rights as he enjoyed in this regard. Concerning the petitioner's statement that he was not represented by counsel on the day of sentence, we point out that such contention is completely and effectually contradicted by the record.[2]

Argument.

I.

The Constitution of the State of New York (Article 1, Section 6) provides that "* * * In any trial in any court whatever the party accused shall be allowed to appear and defendant in person and with counsel as in civil actions, and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him * * *".

Petitioner has claimed that the right to be advised of counsel, in addition to being based on statutes hereinafter discussed, is also protected by the constitutional provision just quoted. We have found no New York case discussing this point insofar as it is alleged to concern the right of a defendant at the time of arraignment and plea. It has been held, however, and to the direct contrary, in New Jersey, that a constitutional provision of that state (Article 1, Section 8) entitling a defendant to the assistance of counsel in his defense, does not apply to the time of arraignment.

In *State* v. *Murphy* (87 New Jersey Law Reports 515), the trial court refused to charge the jury in a murder case that it might take into consideration, on the question of the voluntariness of a confession, the fact that the defend-

[2] The effect of such representation by counsel at and before the time of sentence will be discussed at pages 9-13; 26 of this brief.

and was not represented by counsel at the time of arraignment. The Court of Errors and Appeals with respect to this contention, and in considering the New Jersey Constitutional Provision (almost identical with that of New York), wrote as follows:

> "It is to be observed that the Constitution does not provide that the defendant shall have the right to have assistance of counsel from the time of his arrest, but for his *defense*. Obviously, the word *defense*, as here used, means that a defendant is entitled to be represented and defended by counsel when put in jeopardy on his trial, and that his counsel shall have reasonable access to the prisoner for the purpose of preparing his defense. A criminal defendant at large on bail has this latter privilege to the full. By no stretch of the imagination can the provision be construed to mean that one accused of crime shall have the benefit of counsel to advise him as to whether or not he shall confess. *Confession* is a thing entirely apart from *defense* upon a trial. This is evidenced every day by the pleas of guilty made by criminal defendants without the assistance of counsel to advise them thereon. A plea of guilty amounts to a confession in open court."

We submit, therefore, that such rights as the petitioner enjoys in New York with respect to counsel are statutory in the first instance and derivative from the Fourteenth Amendment to the Federal Constitution in the second instance, and that they are in no way derived from the Constitution of the State. (See Appendix to opinion, *Betts v. Brady*, 316 U. S. 455.)[3] The specific statute is section 308 of the Code of Criminal Procedure. It is disputed by the respondents that these statutory rights have been violated, even at the time of the arraignment and plea by the

[3] In this appendix, New York is listed among the states which require the provision of counsel by statute only.

petitioner, and certainly with respect to the time of his sentence.

The record concerning the days of arraignment and plea is negative in character. The clerk's minutes (Vol. 323, p. 89) do not show the name of any counsel appearing for the petitioner at the time of arraignment, when he pleaded not guilty. Judge Nova's daily calendar for that day is not available. The reverse side of the indictment on which the notation of the plea of not guilty is entered has a printed line reading as follows: "Counsel assigned yes no". The words "yes" and "no" are both stricken out (R. 2-3). As against this we have the petitioner's self-serving declaration, made many years after the event, that when arraigned and on the day of plea he was without counsel, was not asked by the court whether he desired the assistance of counsel, and was not advised by the court of such right (R. 6); and the further statement by the clerk of the court of the general practice, insofar as *he personally* was concerned, not to advise the defendant of his right to counsel when such defendant pleaded guilty (R. 3).

On such state of the record the petitioner has not sustained the burden of proving the central fact, so necessary to his cause, that at the time of arraignment and plea he was not advised of the right to counsel. The mere silence of the record in these respects does not assume the character of affirmative proof. The statement of the clerk (R. 3), while made in good faith with respect to his own practice, cannot be accepted as decisive proof that the court itself did not advise the defendant of his rights at the time of arraignment. It can never be presumed that a judicial officer has failed in the performance of a duty laid upon him by statute: as here, the obligation to ask a defendant appearing for arraignment without counsel "if he desired the aid of counsel, and if he does the court must assign counsel" (Code of Crim. Proc., Sec. 308). On the contrary, a strong presumption exists that the court did perform its duty (*People ex rel. Kennedy* v.

Hunt, 21 N. Y. Supp. [2d] 302, aff'd 257 App. Div. 1039; *People* v. *Steinmetz*, 240 N. Y. 411; *People ex rel. Kammerer* v. *Brophy*, 255 App. Div. 821; *People* v. *Fisher*, 223 N. Y. 459, 464). In the *Fisher* case the Court of Appeals said:

> "It is a general rule that an official is presumed to have proceeded regularly, and when an official act has been done which can only be lawful and valid by the doing of certain preliminary acts, it will be presumed that these preliminary acts have also been done * * *. The assumption that officials do their duty applies in criminal cases * * *."

Petitioner urges that this presumption of official regularity falls in the face of the deficiencies in the record, and cites in support of such contention *People* v. *McLaughlin* (291 N. Y. 480; petitioner's brief, pp. 22-23). The *McLaughlin* case, however, makes no such holding. There the defendant, indicted for a serious crime, informed the trial court at about 12.30 P. M. that it was necessary for him to procure a new lawyer. The court took away from him the opportunity so to do, assigned counsel to him and directed that the case proceed to trial at 2 o'clock that afternoon—all without a request from the defendant that counsel be assigned to him. The trial did proceed at 2 o'clock that afternoon and "twenty-four hours later defendant stood convicted of robbery in the first degree. He received the mandatory sentence of from ten to thirty years in prison". The judgment of conviction was reversed solely on the ground that defendant had a right, protected by both the federal and state constitutions to defend in person or by counsel of his own choosing, and that such right included a private interview with counsel prior to trial. Here, it was held, no fair opportunity to secure counsel of his own choice and to prepare for trial was accorded to the defendant. The court did use the language quoted at page 22 of the petitioner's brief. In its appropriate context, it of course had relevance to the

problem there under review. Here it does not forward judicial inquiry.

That the burden of proving the violation of his rights in the failure to advise him concerning counsel rests upon the petitioner has been held by this court in *Johnson* v. *Zerbst* (304 U. S. 458). There the court wrote:

> "It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel.*" (Italics ours.)

The spiritual ancestor of this petition, and likewise a case which has fostered many more petitions of identical nature in the State of New York in the last half decade, is *People ex rel. Moore* v. *Hunt* (258 App. Div. 24). There the relator sued out a writ of *habeas corpus* to test a judgment of conviction, alleging that at the time of his arraignment he was deprived of his right with respect to counsel in a manner identical with that claimed by the instant petitioner. The order sustaining the writ was affirmed by the Appellate Division on the opinion of the court of first instance. The strong reliance placed on this case in the instant proceeding and in its numerous prototypes makes it important to point out the differences in fact. In the *Moore* case, the sentencing judge admitted the truth of the petitioner's allegations that he had not been advised with respect to counsel. On the writ, therefore, the court held that "*in the light of this opinion of the sentencing judge* it seems to me that it is proper to find that the part of the record of conviction which reads 'was asked if he desired the aid of counsel, to which he

answered * * *, was considered inapplicable because the defendant did not desire a trial". (Italics ours.) It is submitted that a case which rests upon a concession by the officiating judge that he had not followed the statute cannot be a valid precedent for a case such as the instant proceeding where there is no similar admission of fact.

If we concede, *arguendo*, that in point of fact the petitioner was actually not advised of his right to counsel at the time of arraignment and plea it still remains true that, under all of the facts of this case, neither his federal rights under the Fourteenth Amendment to the Constitution nor his statutory rights under section 308 of the Code of Criminal Procedure have been violated. This follows from the fact that at the time of sentence on June 19, 1931, he was actually represented by counsel (Mr. Olivio: R. 22, 24-29). The petitioner denies such representation. It is submitted that the denial has neither merit nor weight. The record discloses the filing of a notice of appearance on his behalf, and further shows an actual participation by counsel on the day of sentence in the form of a plea on behalf of the petitioner. It may be urged, and informally it has been stated by the petitioner, that if such counsel actually appeared, it was not because the petitioner had retained him. That may very well be, and indeed it is a possibility that the sister of the petitioner brought Mr. Olivia into the case (R. 24). It is clear, however, from the record that the petitioner on the day of sentence saw Mr. Olivia in court and did nothing to repudiate his retainer by some other member of the petitioner's family.

We now urge that such participation by counsel constitutes an "intelligent" and "competent" waiver (*Johnson v. Zerbst*, 304 U. S. 458) by the petitioner of any right secured to him under section 308 of the Code of Criminal Procedure and by the Fourteenth Amendment to Federal Constitution. Petitioner's counsel at that point had various remedies which he could have invoked with respect to such alleged violation. The judgment itself was voidable:

An appeal could have been taken, even though it was rendered on a plea of guilty (Code of Criminal Procedure, Sec. 517; *People* v. *Ward*, 148 Misc. Rep. 94; *People* v. *Palagiay*, 216 App. Div. 508). The record on such appeal would have revealed any basic defect in the judgment. (It is precisely because a record on appeal discloses such defects that appeal is the proper remedy. *Matter of Morhous*, 293 N. Y. 131, 140.) Such appeal could have been prosecuted as a matter of right to the Appellate Division of the Supreme Court (Code of Crim. Proc., Sec. 520), and, under proper circumstances and by proper leave, to the Court of Appeals (Code of Crim. Proc., Sec. 520, Subdiv. 3).

Counsel could also on the day of sentence have moved to set aside the plea of guilty on various grounds, including that of misapprehension of the nature of the plea, the youth and inexperience of the petitioner, etc. (Code of Crim. Proc., Sec. 337). This court in its discretion, on such a motion, would have had plenary power to grant the relief and put the petitioner to his trial (*People* v. *Gowasky*, 244 N. Y. 451). The appeal from the judgment would have brought up for review a denial of such motion, had it been denied (Code of Crim. Proc., Sec. 517; *People* v. *Joyce*, 41 Hun 641). This procedure, counsel for the petitioner did not follow, and by failing to do so he acquiesced in the proceedings to that point and clearly waived any irregularity which had occurred prior to the day of sentence. Such waiver by him is a waiver by the petitioner arising out of the legal maxim "*qui facit per alium facit per se*" (*People* v. *Walker*, 198 N. Y. 329). That it is an intelligent waiver does not seem to us to be debatable. Indeed, it is the highest and clearest form of waiver because it is made, not by a layman, but by a lawyer conversant with all of the rights belonging to this petitioner.

The waiver thus existing, results in a complete answer to the petitioner's plea for the relief sought. It has been held in numerous cases, both in the State of New York

and in this court, that the right to be advised as to counsel is one which can be waived.

In *Johnson* v. *Zerbst*, *supra*, this court said:

> "A waiver is ordinarily an intentional relinquishment or abandonment of any known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case including the background, experience, and conduct of the accused."

This court in the same case also said, speaking of the accused's right to counsel under the Sixth Amendment to the Federal Constitution:

> "When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence."

In *Adams* v. *United States* (317 U. S. 269) this court wrote as follows:

> "This brings us to the merits. They are controlled in principle by *Patton* v. *United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263, and *Johnson* v. *Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461. The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, *and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel.* There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer. In taking a contrary view, the court below appears to have been largely influenced by the radiations of this court's

opinion in *Glasser* v. *United States* (315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680). But *Patton* v. *United States*, *supra*, and *Johnson* v. *Zerbst*, *supra*, were left wholly unimpaired by the ruling in the *Glasser* case."

Certainly, the instant case falls well within the spirit of these decisions. At a moment when the petitioner might in the Kings County Court have asserted the impropriety of his plea of guilty and, therefore, the invalidity of the proceedings from that point on, his counsel waived on his behalf all such rights and consented to proceed to the decisive act of sentence. That the petitioner now regrets such acquiescence on his behalf by counsel does not affect the regularity of counsel's procedure or its binding effect on the petitioner. This has been expressly ruled in two cases in the appellate courts of New York.

In *People* v. *Markowitz* (119 App. Div. 841, aff'd 189 N. Y. 562) the defendant was convicted of the offense—it is not a crime—of disorderly conduct. The Appellate Division affirmed, and with respect to the point now here under inquiry, wrote as follows:

> "It is also claimed that the judgment is erroneous because the court did not inform the defendant of his right to counsel. It is true this does not specifically appear, but it does appear that the defendant had counsel who made a motion at the close of the people's case that he be acquitted. His rights were fully protected, and there are no errors which call for a reversal of the judgment."

We submit that there is a complete analogy between the appearance of counsel at the trial, who makes a motion for an acquittal, and the appearance of counsel on the day of sentence who fails to make a motion to set aside a plea of guilty and who further fails to take an appeal from the judgment on which the merits of such motion would be considered if the motion were denied.

A case exactly in point is *People ex rel. Kennedy* v. *Hunt* (257 App. Div. 1039). There a writ of *habeas corpus* to test the legality of the relator's imprisonment, under his contention that he had not been advised of his right to counsel prior to a plea of guilty, was dismissed. The Appellate Division in affirming the order dismissing the writ, said:

> "That the relator 'competently and intelligently' waived his Constitutional right to counsel when he pleaded guilty is sufficiently established by the evidence. If the fact were otherwise, the defect was cured when relator, though represented by counsel, failed to raise the question when the sentence complained of was imposed upon him."

We submit that this decision is determinative of the question here involved.

Petitioner's brief is profusely strewn with citations of decisions of this court and with quotations of cogent language from such cases. It needs but cursory examination to disclose the inapplicability of these decisions to the instant case, affected as it is so completely by the fact of the intelligent and free waiver of the petitioner's rights.

We turn to those upon which the petitioner lays his greatest emphasis and reliance.

In *Powell* v. *Alabama* (287 U. S. 45), the defendants were charged with the crime of Rape. Up until the very morning of the trial no counsel had been assigned to them except that the court had "appointed all of the members of the Bar" for the purpose of arraignment—a practice which this court held to be "far short of meeting, in any proper sense, a requirement for the appointment of counsel". On the morning of trial there appeared counsel who had had no previous consultation with the defendants. On the same morning further counsel was appointed by the court and the case immediately went to trial. Of such procedure this court wrote:

"Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities."

* * * * * * *

"But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances we need not determine. All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law, and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of a case."

In *Avery* v. *Alabama* (308 U. S. 444), the defendant was indicted for Murder. Counsel was assigned on his behalf and entered pleas of not guilty and not guilty by reason of insanity. On the day of trial counsel requested an adjournment in order to continue their investigation. The request was denied and the defendant was convicted. This court upheld the judgment of conviction on the ground that it did not appear that the denial of the motion for an adjournment had actually prejudiced the adequate preparation of the defendant's case.

It is true that the court used the language quoted at page 30 of the petitioner's brief. As a statement of con-

stitutional principle, that language is of great force. That it is not apposite, however, needs no argument. There is other language in the decision which the petitioner fails to quote. A reading of it discloses the obvious reason for such failure of quotation. This court said:

> "In determining whether petitioner has been denied his Constitutional right of assistance by counsel, we must remember that the Fourteenth Amendment does not limit the power of the states to try and deal with crimes committed within their borders, and was not intended to bring to the test of a decision of this court other rulings made in the courts of a state trial. Consistently with the preservation of constitutional balance between state and federal sovereignty, this court must respect and is reluctant to interfere with the state's determination of local, social policy."

This, we submit, is but another way of saying that on the question of waiver, if the same is freely and intelligently made, the decisions of the state court, (*People v. Markowitz, supra; People ex rel. Kennedy v. Hunt, supra*) will be followed by this court.

In *Smith v. O'Grady* (312 U. S. 329), the defendant was arrested in a Nebraska county, was removed to another county and there told that he was wanted in a third county for burglary. He was also promised that if he would plead guilty, he would be dealt with leniently, and that he would receive a sentence of not more than three years. He was subsequently transferred to the third county. He tried unavailingly to procure a copy of the charges against him. He was arraigned, and upon his prearranged plea of guilty was sentenced to a term of twenty years in the penitentiary. He protested vigorously and continued to ask the court for a copy of the charges to which he had pleaded guilty. This request was refused and he thereupon asked permission to withdraw his plea of guilty, and requested the appointment of counsel to ad-

vise him. This also was refused and "within the hour" he was on his way to the penitentiary. There he discovered that he had been duped into pleading guilty, not to a simple charge of burglary, but to a charge of burglary with explosives, punishable in that state by imprisonment of twenty years to life. On such record this court found that if the facts alleged were true, the petitioner had been entrapped and imprisoned unconstitutionally. The absence of any counsel at any point in the proceedings, however, completely destroys all possibility of relevance with the case now under consideration.

In *Glasser* v. *United States* (315 U. S. 60), the defendant was indicted with others for conspiracy to defraud the United States. Defendant was represented by counsel. On the day of trial one of the other defendants repudiated counsel whom he theretofore had had. Defendant's counsel was then asked by the court if he would serve for both defendants. Reluctantly, such assignment was accepted by defendant's counsel. Of such procedure this court wrote:

> "The trial court should protect the right of an accused to have the assistance of counsel. 'This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting appropriate for that determination to appear upon the record.' *Johnson* v. *Zerbst*, 304 U. S. 458, 465, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461.
>
> "No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. The possibility of the inconsistent interest of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in

the impairment of those rights. For the manner in which the parties accepted the appointment indicates that they thought they were acceding to the wishes of the court. Kretske said the appointment could be accepted 'if your Honor wished to appoint him (Stewart)', and Stewart immediately replied: 'As long as the court knows the situation. I think there is something in the fact that the jury knows we cannot control that.' The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances to hold that Glasser freely, albeit tacitly acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

In *Snyder* v. *Massachusetts* (291 U. S. 97), no more was held than that permitting a jury on a murder trial to have a view of the premises, while accompanied by the judge, district attorney and accused's counsel, but without the presence of the accused in person, is not an infringement of the Fourteenth Amendment to the Federal Constitution even though such view was charged by the trial court to be part of the evidence in the case.

In *Palko* v. *Connecticut* (302 U. S. 319), the defendant, indicted for Murder in the First Degree, was convicted of Murder in the Second Degree. That state, pursuant to a statute, appealed the judgment, claiming error committed on the trial against the people. The judgment was reversed and the defendant was again placed on trial. He claimed double jeopardy and urged the unconstitutionality, federally, of the statute permitting the appeal by the people. This court overruled such contention and held that the permission to appeal (and the right to re-try the defendant if the appeal be successful) was not such double jeopardy as is banned by either the Fifth Amendment directly or the Fourteenth Amendment by the inclusive prohibition against deprivation of life, liberty or property without due process of law.

In *Chambers* v. *Florida* (309 U. S. 227), the defendants were arrested in connection with a murder. Confessions were obtained from them which were used on the trial and from which resulted a conviction. On a writ of certiorari this court found that the confessions had been extorted by a process of rigorous and long-continued questioning under circumstances which the court determined to be violative of the Fourteenth Amendment, even though there was no uncontradicted proof of physical violence.

In *United States* v. *Haupt* (136 Fed. [2d] 661), the defendants were indicted and convicted of the crime of Treason. Written confessions were obtained and admitted in evidence, although the defendants were not arraigned before a United States commissioner (Sec. 595, 18 U. S. C. A.) until several weeks after such confessions had been made. In fact however, the defendants had executed a written waiver of custody, construed by the court to be a waiver of the right to be taken before a committing officer. The Circuit Court of Appeals found that prior to the execution of such waiver the defendants were not advised by counsel of their rights and that there is no satisfactory proof that the defendants had knowingly waived such rights. The court based its decision on the position that even if there had been such a waiver, it would be ineffective to excuse the federal agents who procured the waiver of a breach of their duty to present the defendants before an examining commissioner. The court therefore held the admission of the confessions to be error; and for this and other reasons reversed the conviction.

In *Evans* v. *Rives* (126 Fed. [2d] 633), in a *habeas corpus* proceeding the petitioner alleged that he was convicted upon his own plea of guilty, of non-support of a minor without having been advised of his right to counsel. The Circuit Court of Appeals found this to be a fact and reversed the conviction. There is however in this case, no question of waiver raised by the appearance of counsel at any time during the proceedings.

In *Feldman* v. *United States* (322 U. S. 487), the defendant was convicted of using the mails to defraud. He had previously testified in supplementary proceedings in the New York State court, and such testimony, including matters claimed to be admissions with respect to his later prosecution under the mail fraud indictment, was admitted in evidence on that later trial. It was held by this court that, even assuming such evidence to be inadmissible against the defendant in a prosecution in the State Court by reason of an immunity granted by Civil Practice Act, section 789, the use thereof in a federal prosecution was not barred by the Fifth Amendment to the Federal Constitution. The prohibition of that amendment against compelling a defendant to be a witness against himself applies only to prosecutions initiated by the Government in the federal courts.

In *Williams* v. *Kaiser* (323 U. S. 471), the defendant was convicted in Missouri of the crime of Robbery. On a writ of *habeas corpus* he asserted that at his trial he had requested the aid of counsel, which was refused. The petition before the Supreme Court of Missouri was denied without requiring the state to answer or without giving the petitioner an opportunity to prove his allegations. This court reversed the decision of the Missouri court.

In *Rice* v. *Olson* (89 L. Ed. 903), the defendant, an Indian, pleaded guilty to burglary in Nebraska. He thereafter sued out a writ of *habeas corpus* alleging that he had been deprived of his constitutional right to counsel. The state district court dismissed the petition and was upheld by the State Supreme Court which did not require the state to answer. The affirmance was upon the ground that unless the defendant requests the assignment of counsel a waiver is "absolutely" established. This court held such position to be error and reversed the Nebraska Supreme Court.

In this connection we touch upon the petitioner's contention (Petitioner's brief, p. 3) that the County Court of Kings County should not have denied the petition without

an opportunity to him to be heard on the merits. We take this to mean that the petitioner believes he should have been accorded an oral hearing. If this be so, then we submit that there is no absolute right in matters of this type to such an oral hearing. The petitioner is entitled to a day in court, but it is within the power of the state courts to regulate and determine the mechanics and procedure by which such right shall be observed. The establishment of a motion to be determined on affidavits instead of oral hearing does not violate any right of the petitioner. Moreover, it comes within the spirit of the decision of this court in *Avery* v. *Alabama*, *supra*, where it was said:

> "Consistently with the preservation of constitutional balance between state and federal sovereignty, this court must respect and is reluctant to interfere with the state's determination of local, social policy."

And pertinent, too, is the language of this court in *Snyder* v. *Massachusettes*, *supra*; where it is written:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental (citing cases). Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."

The petitioner misconceives the nature of a motion, *coram nobis*, and obviously confuses it with a writ of *habeas corpus*, where the petitioner is actually present in court. It has been held, however, that a writ of *habeas corpus* will not lie in the instant case, and that the motion *coram nobis* is the sole remedy (Matter of Morhous, 293 N. Y. 131). This court will follow the rules of the state

court as to such matter of procedure (*Whitman* v. *Wilson*, *infra* p. 28).

There is another ground on which the respondents assert that no federal question under the due process clause exists in this case. Petitioner has asserted that under all circumstances there is a federal constitutional right to the assignment of counsel in state court prosecutions. We submit that such right as distinguished from the conceded right to counsel in federal prosecutions (Sixth Amendment) does not exist to the all-inclusive degree urged by the petitioner, and that there are many circumstances under which the right cannot be asserted.

We have already touched upon the fact that the right may be waived. We assert now that due to the particular circumstances of this case and in addition to the fact of waiver, there has been no violation of the Fourteenth Amendment to the Constitution. In support of this proposition we point to *Betts* v. *Brady* (316 U. S. 455).

Betts was indicted in Maryland for the crime of Robbery. He informed the court, when arraigned, that he was unable to employ counsel and requested the assignment of a lawyer. The court refused such assignment, stating that it was the practice to appoint counsel for indigent defendants only in prosecutions for murder and rape. Thereupon Betts, without waiving his claimed right to counsel, pleaded not guilty and proceeded to trial without a jury. Witnesses summoned in his behalf were examined, and he cross-examined the state's witnesses. He himself did not take the stand. Upon a verdict of guilty he was sentenced to a term of imprisonment for eight years. While thus incarcerated he filed with a judge of a county circuit court a petition for a writ of *habeas corpus*, claiming that he had been deprived of the right to counsel guaranteed by the Fourteenth Amendment to the Federal Constitution. The cause was heard on the writ, his contention rejected and he was remanded to the custody of the warden. He thereafter petitioned for a similar writ on the same grounds before the chief judge of the Maryland Court of Appeals

and with a like result. This court allowed a writ of certiorari, the constitutional question being put by Mr. Justice Roberts as follows:

> "Was the petitioner's conviction and sentence a deprivation of his liberty without due process of law, in violation of the Fourteenth Amendment, because of the court's refusal to appoint counsel at his request?"

The court answered the question in the negative, and held that there is no one, all-inclusive rule whereby the question of due process or a deprivation thereof can be determined, either in the case of the federal government (Sixth Amendment) or in the case of the states (Fourteenth Amendment). The court said:

> "The phrase (i. e. due process of law) formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial *is to be tested by an appraisal of the totality of facts in a given case*" (462). (Italics ours.)

The court then proceeded to distinguish cases involving the denial of counsel (*Powell* v. *Alabama*, 287 U. S. 45; *Avery* v. *Alabama*, 308 U. S. 444; *Smith* v. *O'Grady*, 312 U. S. 329), from the facts in the instant case. Here it was found that:

> "In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary

intelligence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction. Only recently the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused, tried without counsel, had been handicapped by the lack of representation."

An application of the standard thus adopted in *Betts v. Brady*, to the circumstances surrounding the arraignment and conviction (by his own plea of guilt) of the petitioner, discloses a striking similarity in the cases. The affecting picture which the petitioner paints of himself is not one true to his own life. He was not a mere youth, innocent of the crime with which he was charged, ignorant of the rules of law, and bewildered by the formality of courts and procedure. He had, on the contrary, already been adjudged a juvenile delinquent and, therefore, had already appeared in a court for that purpose, and in connection with that experience, as a result of which in 1928 he was incarcerated in the House of Refuge (R. 28). The probation investigation of the court which sentenced him disclosed that after the petitioner and his accomplice had, at the point of a gun, stolen the taxicab involved in the indictment, they robbed two other men, and the next night stole a Buick automobile. In this stolen automobile they proceeded to a further attempted robbery but were apprehended. Four fully loaded revolvers were found in the car. One contained bullets which the petitioner had admittedly sliced in order to make more certain the death or injury of the victim, and to prevent the identification of

the bullet (R. 26). These facts portray, not an innocent youth, but an accomplished and hardened criminal who had learned completely, albeit too early, almost the entire curriculum of crime. It should be pointed out that at the time of the plea he faced prosecution on another indictment for the theft of the Buick automobile and for the other robbery. It cannot be questioned that his plea of guilty in the instant case was induced, not by the inexperience or lack of knowledge, but by the fact that such plea guaranteed him a dismissal of the other indictments. He is completely like the petitioner Betts, of whom this court, with an under-statement equally applicable to this petitioner, said, "was not wholly unfamiliar with criminal procedure".

Petitioner draws a distinction with the *Betts* case in the fact that in Maryland there was no statutory requirement for the appointment of counsel. We concede a certain measure of distinction, but the difference is not as complete as urged by the petitioner. Section 188 of the Code of Criminal Procedure cited by petitioner (Brief, p. 56), applies only to the magistrates' court and does not require the appointment of counsel. It merely gives the defendant the right to be apprised of the fact that he himself may retain counsel before any further proceedings are had. Section 308 of the Code of Criminal Procedure does direct that the defendant, if appearing for arraignment without counsel "must be asked if he desire counsel and if he does the court must assign counsel". The choice is voluntary and lies with the defendant. He may choose counsel of his own, in which event the court has no right to appoint counsel on his behalf (*People* v. *Hull*, 251 App. Div. 40; *People* v. *Price*, 262 N. Y. 410). He may desire to defend himself and here, too, the court has no right to appoint counsel (*People* v. *Price*, *supra*).

It may be urged that there is no showing in the record that this petitioner exercised such right. We concede that there is no *record* evidence of any such choice on his part. The facts, however, point quite clearly, nay conclusively,

to such choice by the petitioner. By the plea, even though such plea was attended by a severe sentence, the petitioner freed himself of the possibility of further indictment and punishment for other crimes. (This brief, page 24, *supra*). As the sentencing court pointed out, he was "the ring leader of the mob" and had admitted that he supplied the guns which he himself owned (R. 28). With such a record and taught by such experience, he undoubtedly made the choice for the reasons set forth by the county judge in these words:

> "When I took a plea of you to this one indictment unarmed—and that was the only thing the district attorney would consent to—in my judgment you got all the clemency that you deserve."

We close this phase of our discussion of the case by a quotation from the language of this court in *Betts* v. *Brady*, *supra*, which we submit to be a complete answer to the petitioner's contention:

> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel" (473).

II.

The fact of waiver affects the petitioner herein in still another aspect, this time going to the jurisdiction of this court. As we have pointed out, counsel who represented him on the day of sentence had the right to move to set

aside the plea of guilty (Code of Crim. Proc., Sec. 337), and from such denial of the motion could have appealed from the judgment of the court and on such appeal brought up the question of the impropriety of the denial of the motion. The appeal would have laid, as a matter of right, to the Appellate Division of the Supreme Court, and by proper leave to the Court of Appeals. Neither one of these courts would have rendered a decision "by the highest court of the state in which a decision could be had" (Sec. 237 of the Jud. Code, Tit. 28, Sec. 344 [b]). Instead, and as a matter of volition and choice the petitioner abandoned all right of appeal and chose, some fourteen years after the event, to initiate this proceeding in the nature of a motion *coram nobis*.[4]

Section 237 of the Judicial Code does not confer jurisdiction upon this court to review any cause wherein a final judgment or decree has been rendered in a particular proceeding *chosen by the litigant*, even though the court rendering it is in that instance the last court available. On the contrary, jurisdiction is conferred upon this court only after the litigant has been to the highest court in *any* proceeding which was open to him because of the nature of his grievance (*McKnight* v. *James, Warden*, 155 U. S. 685). It is interesting to note the parallel here with the *McKnight* case. There the petitioner, indicted for a crime, pleaded not guilty and was tried without having been as-

[4] The advantage to the petitioner in such a choice is so obvious as clearly to expose the reason motivating the choice. If he had proceeded to an appeal in 1931 and been successful, he would have been immediately subjected to a trial at which the people could have procured witnesses and successfully have established the fact of his guilt of Robbery in the First Degree. Delay has worked in his favor by almost geometric precision. Thus, witnesses who in 1931 could have been relied upon to establish the people's case cannot be produced in 1945 with the same facility, if they are at all in existence. In addition, there is the reason previously referred to, that the petitioner by his plea freed himself from further punishment by reason of other crimes committed by him.

signed counsel. After sentence, he sued out a writ of *habeas corpus* before a judge of the Ohio Circuit Court sitting in chambers, who dismissed the writ. This court held that the order of a judge sitting in chambers was not the order of a court. It further held that the petitioner might have applied to have the order of the judge in chambers made the order of the court itself. It was also held that if the order of the judge in chambers be the final order of the court itself, then it was reviewable by the Supreme Court of Ohio as that state's highest tribunal. This court summed up the matter in the following words:

> "In other words, the order cannot be the order of a judge to defeat the jurisdiction in error of the Supreme Court of Ohio, and at the same time an order of a court to confer jurisdiction upon this court to issue a writ of error. The argument in reality defeats itself. Its very strength is also its weakness. By proving that a writ of error will lie from this court, it also proves that a writ of error will lie from the Supreme Court of Ohio, and this fact of itself defeats the jurisdiction of this court."

We re-state the proposition thus: by an appeal from the judgment of conviction (including the ancillary question of the denial of the motion to set aside the plea of guilty) the petitioner could have presented the present question either to the Appellate Division of the Supreme Court or to that court and the Court of Appeals, and thus could have procured a determination by a court higher than the County Court of Kings County. In that event (and if a federal question actually existed) this court would then have had jurisdiction by virtue of section 237 of the Judicial Code. Petitioner's failure to avail himself of the right of appeal and his choice of a different method of procedure cannot confer a jurisdiction upon this court not otherwise existing.

The instant case, therefore, comes expressly within the opinion of Mr. Justice Frankfurter in *Whitman* v. *Wilson* (318 U. S. 688), in which he wrote as follows:

> "Since the argument in this case, the New York Court of Appeals formally dismissed petitioner's appeal to that court from the order of the Appellate Division denying him habeas corpus, on the ground that 'the case is one where appellant is not entitled to a writ of habeas corpus under Section 1231 of the Civil Practice Act'. But inasmuch as the constitutional questions which appellant asked the court to review are substantial, to use the language of Chief Judge Lehman, he could, under New York practice, have gone to the Court of Appeals as of right if habeas corpus were the proper remedy. The merits of petitioner's constitutional claim have therefore never been passed on—by, because never presented in an appropriate proceeding to, the highest available New York court. Consequently, it cannot be entertained here. *Since petitioner has misconceived the mode by which his constitutional claim may properly be brought before the New York courts, this petition should be dismissed.*" (Italics ours.)

Petitioner seeks to avoid the effect of his own voluntary choice of proceeding by citing the cases of *Betts* v. *Brady*, *supra*; *Jamison* v. *Texas* (318 U. S. 413); *Lavgent* v. *Texas* (318 U. S. 118), and *Tenner* v. *Dullea* (314 U. S. 694). All of these cases are distinguishable. We do not understand the reference to *Tenner* v. *Dullea*, *supra*, inasmuch as the petition for the writ of certiorari was there denied by this court "in the exercise of our discretion for the reason that petitioner has not presented his application for habeas corpus to the highest court of the state", with the right reserved to the petitioner so to do, and in the event of a denial by that court to renew in this court an application for a writ of certiorari. The *Lavgent* and

Jamison cases, *supra*, are distinguishable by reason of the facts passed upon in *Jamison* v. *Texas* by this court. In the opinion the following is found:

> "By our order of December 21, 1942, 63 S. Ct. 325, 87 L. Ed. —, we requested counsel to discuss whether this judgment could be fully reviewed on this record by a higher state court by habeas corpus or other proceeding. *Under the statutes of Texas, no appeal lies from the judgment of the County Court imposing a fine of this amount.* * * * Since there is by Texas law or practice, no method which has been called to our attention for reviewing the conviction of the appellant on the record made in the County Court, we are of the opinion the appeal is properly here under section 237a of the Judicial Code." (Italics ours.)

Of *Betts* v. *Brady*, *supra*, it may be said, on the question of jurisdiction, that this court there found the order dismissing the writ of *habeas corpus* to be "final in the sense that an order of a Maryland judge in a *habeas corpus* case, whatever the court to which he belongs, is not reviewable by any other court of Maryland except in specific instances claimed in statutes which are here inapplicable". Moreover, this court also said:

> "Although the judgment is final in the sense that it is not subject to review by any other court of the state, we may, in our discretion, refuse the writ when there is a higher court of the state to which another petition for the relief sought could be addressed. * * *" (Citing *Tegner* v. *Bullen*, *supra*.)

Furthermore, Betts had no counsel at any stage of the proceedings and cannot be held to have waived the right to appeal from the judgment of conviction. Here, the exactly opposite situation of the petitioner strongly raises, again, the factor of waiver.

It may be urged that failure to take an appeal from the judgment of conviction upon which we rely in part as proof of the waiver by the petitioner, is not in law such a waiver. It is true that in the case of *Williams* v. *Kaiser*, *supra*, this court said:

> "Missouri, however, does contend that the denial of counsel could have been challenged by petitioner by an appeal, that no appeal was taken, and that no extraordinary circumstances are shown which excuse that failure. Heretofore we have not considered a failure to appeal an adequate defense to habeas corpus in this type of case. *Smith* v. *O'Grady*, *supra*. Under these circumstances the failure to appeal only emphasizes the need of counsel. If an appeal were made such a requirement, the denial of counsel would in and of itself defeat the very right which the Constitution sought to protect."

In the *Williams* case, however, the fact was conclusively established that the defendant was at no time represented by an attorney, qualified by knowledge of the law to advise the defendant of the right to an appeal. This essential fact distinguishes the instant case from the *Williams* case and renders its language inapplicable, here, to defeat the proof of deliberate waiver.

In Conclusion.

We respectfully submit:

1. That no federal question is raised by any contention made by the petitioner in the case presented to this court.

2. The case presented by the petitioner is not one concerning which this court has jurisdiction under section 237 of the Judicial Code, tit. 28, sec. 344b, because of the

fact that no "final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * *."

III.

Therefore the order of the County Court of Kings County should be affirmed.

Respectfully submitted,

GEORGE J. BELDOCK,
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Kings County.

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Assistant District Attorneys,
Of Counsel.

Appendix.

Section 517, New York Code of Criminal Procedure.

"§ 517. *In what cases an appeal may be taken by defendant.*

An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death, the appeal must be taken direct to the court of appeals. * * *."

Section 520, New York Code of Criminal Procedure.

"§ 520. *Appeal, a matter of right; one appeal; how taken.*

All appeals, provided for by this chapter may be taken as a matter of right. Every person convicted in a criminal

action or proceeding shall have the right to have such judgment of conviction or order reviewed on appeal by an appellate tribunal as herein provided, but there shall be only one such appeal and the decision of the appellate court shall be final, and no appeal shall lie from that court to any other court except as hereinafter provided:

1. In the City of New York such appeals shall be taken as follows: * * * from a conviction by the court of general sessions of the County of New York or by a county court within said city * * * except where the penalty is death, to the Appellate Division of the Supreme Court * * *.

2. * * *

3. Where an appeal has been taken and has been decided by any of the appellate tribunals referred to, a further right of appeal to the court of appeals shall lie as hereinafter prescribed, but not otherwise. If a judge of the court of appeals or a justice of the Appellate Division of the Supreme Court * * * certifies that a question of law is involved which ought to be reviewed by the court of appeals, then a further appeal on such question of law may be taken to the court of appeals.

4. * * * *."

Section 337, New York Code of Criminal Procedure.

"§ 337. *Plea may be withdrawn, by permission of the court.*

The court may in its discretion, at any time before judgment upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted."

CONSTITUTION OF THE UNITED STATES.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

Fourteenth Amendment (in part).

"*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE CONSTITUTION.

Article One:

"Section 6. No person shall be held to answer for a capital or otherwise infamous crime, * * * unless on indictment of a grand jury; and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and to be confronted with the witnesses against him * * * "

New York Code of Criminal Procedure.

"§ 188. *Magistrate to inform defendant of the charge and his right to counsel.*

When the defendant is brought before a Magistrate upon arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had."

"§ 308. *Defendant appearing for arraignment without counsel to be informed of his right to counsel.*

If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. * * * *."

New Jersey State Constitution.

Article I, Section 8. *Criminal prosecutions; rights of accused.*

In all criminal prosecutions the accused shall have the right to a speedy, and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense."

SUPREME COURT OF THE UNITED STATES.

No. 152.—October Term, 1945.

Frank Canizio, Petitioner, *vs.* The People of the State of New York.	On Writ of Certiorari to the County Court of Kings County, State of New York.

[February 4, 1946.]

Mr. Justice Black delivered the opinion of the Court.

On June 1, 1931 in the County Court of Kings County, New York, the petitioner pleaded guilty to the crime of robbery in the first degree. On June 19, 1931 that court sentenced him to serve a term of from 15 to 30 years in State prison. After the petitioner had served almost 14 years of this sentence he instituted this proceeding by a motion, coram nobis, in the King's County Court, praying that the June 19, 1931 sentence be vacated and set aside. His motion, verified by oath, alleged that at the time of his arraignment, guilty plea, and sentence, petitioner was 19 years old and unfamiliar with legal proceedings; that he was not represented by counsel; and that the court neither asked him whether he desired counsel to be assigned, nor advised him of his right to counsel. Petitioner's motion charged that the acceptance of his guilty plea and the sentencing under these circumstances violated Article 1, Section 6 of the New York State Constitution and Section 308 of the New York Code of Criminal Procedure, and deprived him of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The District Attorney filed an affidavit opposing the motion. This affidavit, based on information obtained from Court records, admitted that these failed to show that petitioner had been represented by counsel when he was arraigned and when he pleaded guilty on June 1, 1931. To overcome this apparent defect of the record the affidavit urged the presumption of regularity of judicial proceedings to support the conclusion, in the absence of a clear showing to the contrary, that the judge must have performed his duty under New York's laws to advise petitioner of

his right to counsel. The District Attorney contended that petitioner's motion though verified was not sufficient to overcome this presumption, especially since petitioner's conviction occurred 14 years ago. Moreover, the affidavit denied that petitioner was not represented by counsel at the time of sentencing, and alleged that on June 17, 1931, two days before the sentence was imposed, there was filed a notice of appearance of counsel on behalf of the petitioner. Thus, according to the affidavit petitioner was represented by counsel from June 17th to June 19th, 1931. Petitioner filed no denial to this affidavit.

The Court denied petitioner's motion on the basis of the aforementioned papers including the record of the original proceeding, and without permitting petitioner to introduce any evidence. Under New York practice petitioner's motion was the proper procedure to raise the Federal question. *Lyons* v. *Goldstein*, 290 N. Y. 19. Since the Court's denial of the motion cannot be appealed to any higher New York Court, *People* v. *Gersewitz*, 294 N. Y. 163, we have jurisdiction to consider the case. *Betts* v. *Brady*, 316 U. S. 455, 461. We granted certiorari because the case presents an important question involving the right to counsel under the Constitution of the United States.

Before we consider this question we shall assume that petitioner was without counsel when arraigned and when he pleaded guilty and that although he was unfamiliar with his legal rights the court failed to inform him of his right to counsel. Consequently, had there been nothing to contradict petitioner's general allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced, his charges would have been such as to have required the Court to hold a hearing on his motion. *Rice* v. *Olson*, 324 U. S. 786. But, the District Attorney's affidavit and the record and stenographic transcripts of the original proceedings in which petitioner was sentenced show that petitioner was actively represented by counsel in long hearings during the day of sentence. In our opinion, these new facts, undenied, so far refuted petitioner's entire Constitutional claim as to justify the court's holding that a hearing on petitioner's motion was unnecessary.

These papers before the trial court showed that petitioner along with two others were originally charged under three counts. Petitioner pleaded guilty on one charge on condition that he would not

be prosecuted on the other two. Thereafter, as we have indicated, an attorney appeared on his behalf in an effort to secure a low sentence. The attorney could have moved to withdraw the plea of guilty and the County Court of Kings County would have had the power to set aside the plea and let the petitioner stand trial. New York Code of Criminal Procedure, § 337; *People* v. *Gowasky*, 244 N. Y. 451. Petitioner's counsel probably thought it undesirable to do so, because this move might have jeopardized his chances for securing a low sentence. The plea was to robbery in the first degree, unarmed. The record clearly shows that petitioner was heavily armed. Had he been convicted of first degree robbery while armed he would in all likelihood have gotten a higher sentence. Cf. *People ex rel. Oberst* v. *Murphy*, 256 App. Div. 58; *People ex rel. Pilo* v. *Martin*, 262 App. Div. 1056. At any rate, whatever the reason petitioner's counsel did not move to withdraw the guilty plea.[1] All of this demonstrated to the satisfaction of the court below that even though petitioner may not have had counsel at the beginning, he had counsel in ample time to take advantage of every defense which would have been available to him originally. We think the record shows that petitioner actually had the benefit of counsel. When that counsel took over petitioner's defense he could have raised the question of a defect in the earlier part of

[1] The assumption cannot be made that had petitioner's counsel done so it would not have been granted. If the motion had in fact been denied, petitioner's counsel could have appealed and thus have brought up the denial of the motion. Code of Crim. Proc. Sec. 517; People v. Joyce, 41 Hun. 641. If the case had then eventually reached us our previous decisions would have compelled us to hold the denial of the motion improper. See e. g. Rice v. Olson, *supra*. But the question is not before us in this proceeding.

It is suggested that the New York case of People v. Steinmetz, 240 N. Y. 411, which allows a withdrawn guilty plea under some circumstances to be admitted at trial as evidence in the nature of a confession, might have compelled counsel to refrain from making a motion to withdraw the plea because in view of the *Steinmetz* rule little would thereby be accomplished in a practical way. In the *Steinmetz* case defendant had been represented by counsel at the time of the guilty plea. The opinion, read as a whole, seems to indicate that a guilty plea would be inadmissible as evidence at a trial, where it was later withdrawn because defendant, ignorant of his right to counsel, had at the time of pleading guilty not been informed of his right. We have held that in a federal court a withdrawn guilty plea is not admissible in evidence. Kercheval v. United States, 274 U. S. 220, 223, 225. See also People v. Ariano, 264 App. Div. 426. If a guilty plea without counsel should be held admissible in New York, the proper case in which to raise the issue of the propriety of its admission is on appeal to this Court on conviction after trial. Otherwise, if such an admission is proper at all it would also be proper if a trial is had after we reversed this case. Consequently nothing would be gained by a reversal on that ground.

the proceedings.[2] Failing to do so when the statute afforded him the opportunity, we cannot say that the court denied petitioner the right to have a trial with the benefit of counsel.

Petitioner's motion was, therefore, properly denied.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice MURPHY, dissenting.

The complete travesty of justice revealed by the record in this case forces me to dissent.

The constitutional right to assistance of counsel is a very necessary and practical one. The ordinary person accused of crime has little if any knowledge of law or experience in its application. He is ill-prepared to combat the arsenal of statutes, decisions, rules of procedure, technicalities of pleading and other legal weapons at the ready disposal of the prosecutor. Without counsel many of his elementary procedural and substantive rights may be lost irretrievably in the intricate legal maze of a criminal proceeding. Especially is this true of the ignorant, the indigent, the illiterate and the immature defendant. *Powell* v. *Alabama*, 287 U. S. 45, 69; *Williams* v. *Kaiser*, 323 U. S. 471, 474-476. Courts must therefore be unyielding in their insistence that this basic canon of justice, this right to counsel, be respected at all times.

Today, however, a serious qualification is added to this constitutional right to which I am unable to assent. Petitioner and two others were indicted on May 25, 1931, for three offenses: (1) robbery in the first degree; (2) grand larceny in the second degree; and (3) assault in the second degree. They were arraigned on the same day and pleaded not guilty. Petitioner at this time was but 19 years old, indigent, poorly educated, orphaned and ignorant of his right to counsel. The court did not inform him of his right to counsel at this time and it does not appear that he competently and intelligently waived his constitutional right. Several days later, on June 1, petitioner again appeared without counsel and without being informed of his right in that respect. This time he withdrew his plea of not guilty and entered a plea of guilty to the crime of first degree robbery. The prosecutor agreed to withdraw the other charges. On June 17,

a notice of appearance of counsel on behalf of petitioner was filed. And on June 19, in the presence of this counsel, petitioner was sentenced to serve from 15 to 30 years in prison. On the basis of these facts, the Court now holds that petitioner was adequately represented by counsel. The error manifest in the denial of the right of counsel during the arraignment and the plea of guilty is held cured by the mere presence of counsel on the day of the imposition of the sentence.

It is said that, at least under New York practice, the attorney on the day of the sentencing could have moved to withdraw petitioner's plea of guilty; the judge would then have had power to set aside the plea and let the petitioner stand trial. On the assumption that the judge would have granted such a motion had it been made, the argument is advanced that petitioner had counsel in ample time to take advantage of every defense originally available. Thus the conclusion is reached that this denial of the right to counsel prior to the imposition of sentence is in compliance with the Constitution.

In my opinion, however, the right to counsel means nothing unless it means the right to counsel at each and every step in a criminal proceeding. The failure at any particular point to have representation or to be aware of one's right to counsel may have an indelible and imponderable effect upon the entire proceeding, an effect which may not be erasable on the day of imposing the sentence. As was said in *Glasser* v. *United States*, 315 U. S. 60, 76, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." So here we cannot assume or determine that the denial of counsel at the time of the arraignment and plea was harmless. Nor can we say with certainty that the presence of counsel at the final stage of the proceeding was sufficient to counteract the prejudice inherent in the prior denial of counsel. Unless all the effects of such a constitutional infirmity are completely and unquestionably eliminated, a conviction cannot stand. An elimination of that nature ordinarily, and particularly in this case, means a new proceeding in which the right to counsel is fully protected at all times.

It is further significant that the failure of the trial court to inform the petitioner of his right to counsel was in violation not

only of the due process clause of the Fourteenth Amendment but also of Article 1, Section 6, of the New York Constitution and of Sections 8, 188, 308 and 309 of the New York Code of Criminal Procedure. The arraignment and the plea of guilty were thereby vitiated, from which it follows that the conviction was inconsistent with due process of law. See *Johnson* v. *Zerbst*, 304 U. S. 458, 468; *Waley* v. *Johnston*, 316 U. S. 101, 104.

The lack of due process in the conviction was unaffected by the possibility that the counsel which petitioner eventually obtained might have successfully moved to vacate the void plea of guilty. Constitutional rights as well as due process requirements rest upon something more substantial than what might have been but was not done. The inescapable facts confronting us are that petitioner was denied the right to counsel and that the court's judgment was based upon an illegal arraignment and plea. Counsel's negligence in failing to move to set aside that plea should not blind us to those facts, nor can it invest the proceeding with the due process which it otherwise lacked.

Moreover, even had petitioner's counsel been successful in making such a motion, the effect of the illegal plea might not have been dissipated. Under New York law, a plea of guilty which is withdrawn may subsequently be admitted in evidence at the trial. *People* v. *Steinmetz*, 240 N. Y. 411, 148 N. E. 597. And even though such a practice might be of doubtful constitutionality under these circumstances, the possibility of its occurrence may have effectively and understandably deterred counsel from seeking to set aside the plea and subjecting petitioner to the risk of a greater sentence.

The denial of the petitioner's constitutional rights was a serious matter. Unaided by counsel, he was faced with charges of three crimes. Each of these crimes involved different degrees. Petitioner was not competent to decide whether he was properly charged with the correct degree of each crime. Nor was he competent to determine whether to plead guilty to any or all of the offenses. Those were complex legal problems as to which petitioner deserved legal aid. Yet that necessary aid was denied him. Nothing happened on the day of sentencing, moreover, to negative that fact. To sustain his conviction therefore fails to give petitioner the high degree of protection which his constitutional right to counsel deserves.

Mr. Justice RUTLEDGE, dissenting.

I agree with my brother MURPHY that the judgment should be reversed and join substantially in his opinion.

My conclusion rests squarely upon the fact, as I understand the record and the law of New York, that under that law a withdrawn plea of guilty is admissible in evidence against the accused at his later trial. *People* v. *Stratimacs*, 240 N. Y. 411. I have heretofore expressed my reasons for thinking that such a procedure involves a species of self-incrimination. *Wood* v. *United States*, 128 F. 2d 265. That question however has not been determined here, although it has been held on nonconstitutional grounds that in a federal court a withdrawn plea of guilty is not admissible. *Kercheval* v. *United States*, 274 U. S. 220. Nor has this Court decided whether such a procedure followed in a state court would be in violation of any constitutional provision.

In the setting of the facts in this case the significance of the New York rule is that the rule itself made it impossible for the full effects of petitioner's invalid plea of guilty to be wiped out even through a successful motion for withdrawal had one been made by petitioner's attorney after his appearance in the cause following the plea and shortly before sentence.

It is not at all certain that the motion would have been successful. Had it been made and granted, petitioner by the state's law would have been confronted with the necessity of overcoming by proof the incriminating effect of his prior plea. His burden of defense thus increased not only would have been greater than if the invalid plea had not been made. It would have gone far to destroy the presumption of innocence to which he was entitled until otherwise and lawfully proved guilty. Finally, his lawyer presumably would have been cognizant of these facts. Imagination need not be stretched to believe that even the most competent attorney, confronted with such a situation, might have chosen to advise against moving to withdraw the plea rather than undertaking the heavy burden of meeting it by proof at the trial.

In my opinion the damage done by the original invalid plea was not removed by the attorney's eleventh-hour entry nor could it have been at that time, fully and effectively, in view of the existing state of the law and the facts. Accordingly, I think there was no effective waiver through the late entrance of counsel and his hampered advice, which as I understand is the only basis for the Court's decision. There was no choice but Hobson's.